REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MAKUENI

HCCRA NO. 150 OF 2019

CHRISTINA SINA MUTUKU.....APPELLANT

-VERSUS-

REPUBLIC.....RESPONDENT

(Being an appeal from the original conviction and sentence of Hon. J.O Magori (S.P.M)

in Makindu Senior Principal Magistrate's Court SPMCR Case No. 778 of 2014

issued on 13th November, 2019).

JUDGMENT

1. The appellant was charged in the magistrates' court with defilement contrary to section 8(1) (3) of the Sexual Offences Act No. 3 of 2006. The particulars of offence were that on 19th April 2014 in Kibwezi District within Makueni County intentionally caused her vagina to be penetrated by the penis of AA a child aged 14 years.

2. In the alternative, she was charged with committing indecent act with a child contrary to section 11(1) of the Sexual Offences Act. The particulars of offence were that on the same day and place intentionally touched the penis of AA a child aged 14 years with her finger.

3. She denied both charges. After a full trial she was convicted of the main count of defilement and sentenced to serve 20 years imprisonment.

4. Dissatisfied with the decision of the trial court, the appellant has come to this court on appeal and relied on the following amended grounds of appeal –

> ***1) The trial magistrate erred in law and fact by failing to note that the charge sheet was defective for non-conformity with the evidence adduced.***
>
> ***2) The trial magistrate erred in law and fact by failing to find that one of the major ingredients of the offence .i.e. penetration by the accused person was not proved by the evidence on record.***
>
> ***3) The trial magistrate erred in fact and law by failing to find that medical report relied on to base conviction of the appellant did not comply with the statutory safeguard under section 77 of the Evidence Act (cap 80.)***
>
> ***4) The trial magistrate erred in law an fact by failing to realize that the material contradictions not only went to the root of the whole case but also displaced the credibility of the witness truth.***
>
> ***5) The trial magistrate erred in law and fact by failing to find that essential witnesses were not availed to prove the prosecution case thereby violating Article 50(2) (c) (j) of the Constitution.***
>
> ***6) The trial magistrate erred in law and fact by rejecting the cogent defence case which exonerated the appellant from wrong doing.***

5. Both the appellant and the Director of Public Prosecutions filed written submissions in the appeal which I have perused and considered.

6. This being a first appeal, I have to start by reminding myself that I am duty bound to re-evaluate all the evidence on record, and come to my own independent conclusions and inferences – see **Okeno –vs- Republic (1972) E.A 32**.

7. I have re-evaluated the evidence on record. The prosecution called 4 witnesses and the appellant tendered an unsworn defence statement and did not call defence witnesses.

8. This being a case of defilement, the prosecution was required to prove sexual penetration, the identity of the culprit and the age of the complainant.

9. With regard to penetration, the complainant testified as Pw1 and stated that the appellant being a neighbour at home, stormed his room with condoms and demanded to have sexual intercourse with him. The appellant also caressed him and aroused his sexual desire then put a condom on his penis and pushed the penis into her vagina and they had sexual intercourse. Pw2 SZA the mother of the complainant also testified that she pushed the door open and found both the complainant and appellant naked in that room and that it was during the day. I note that the medical evidence tendered by Pw3 Dr. Esther Musyoki did not record any finding to confirm sexual intercourse. However, in my view, though the medical evidence did not confirm sexual activity on the complainant, the prosecution proved beyond any reasonable doubt that the complainant and appellant had sexual activity that day. The evidence of Pw1 and Pw2 in my view was clear and consistent in this. The medical examination on the complainant would not establish sexual activity, first because a condom was used and secondly because it is very difficult to find any lacerations on a man's genital organ after sexual activity. In my view, sexual activity can be proved even in the absence of medical evidence. I thus find that sexual activity or penetration was proved.

10. Was the appellant the culprit? Again, the evidence of Pw1 the complainant and Pw2 SZA is very clear on this and in addition a report was made shortly thereafter to the police on the incident as confirmed by the evidence of Pw4 PC Michael Kihumba. In all this the appellant was placed at the scene of the incident, and was actually found naked in broad daylight by Pw2 SZ the mother of the complainant. Though in her defence the appellant put up a defence for *alibi*, that defence was clearly an afterthought and in my view the trial court correctly disbelieved the same. I find like the trial magistrate that the appellant was the culprit.

11. I now turn to the proof of age of the complainant. This was a case where the trial started *de-novo* after the complainant Pw1 and his mother Pw2 had previously testified. The complainant Pw1 stated in evidence that he was 18 years in 2018 and that he was 13 years in 2014. Pw2 SZ the mother stated that the complainant was 14 at the time of the incident. None of the two relied on any documentary evidence or stated that there existed any document to support the date of birth. Pw4 PC Michael Kihumba however produced a birth certificate to support the prosecution allegation that the complainant was 14 years at the time of incident. I note that the entries in the birth certificate were that the complainant Ali Arafat was born on 19th October 2000, and that the said birth certificate was issued on 29/05/2015 after the incident.

12. In my view, the entries in the birth certificate are highly suspect and did not prove the age of the complainant for two reasons. First, Pw1, and Pw2 did not mention anything to do with a birth certificate in their evidence, or any documentary evidence on the age of the complainant. Secondly, the said birth certificate having been issued after the alleged incident, the person who made the entries should have been called to testify on how he or she acquired the information about the date of birth of the complainant. That not having been done the birth certificate cannot be relied upon to establish the age of the complainant.

13. In my view therefore, the age of the complainant was not proved by the prosecution beyond reasonable doubt and on that account, the appeal will succeed as the offence of defilement was not proved.

14. I thus allow the appeal, quash the conviction and set aside the sentence. I order that the appellant be set at liberty unless otherwise lawfully held.

DELIVERED, SIGNED & DATED THIS 15TH DAY OF JULY, 2021, IN OPEN COURT AT MAKUENI.

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GEORGE DULU

JUDGE